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P'ng Hun Sun v Dato' Yip Yee Foo

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–528 OF 2010
LINTON ALBERT, MOHTARUDIN BAKI AND ZAWAWI SALLEH JJCA
18 JUNE 2013

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Civil Procedure — Appeal — Interference by appellate court — Standard of review to cases which involved mixed questions of law and fact — Whether appellate interference warranted

D

Contract — Friendly loan — Money allegedly loaned — Whether monies received as friendly loan or as part payment for purchase of respondent's property — Counterclaim — Whether there was valid and binding share sale agreement between respondent's nominee and appellant — Whether there was meeting of minds

E

Evidence — Admissibility of evidence — Parole evidence rule — Whether oral evidence was admissible to prove existence of contract

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The appellant filed an action against the respondent for the return of a friendly loan in the sum of RM6.5m. As security for the loan the respondent had allegedly agreed to pledge a property situated in the district of Jesselton, Sabah ('the property'). According to the first respondent, the RM6.5m was not a friendly loan but part payment for the purchase of the property. It was the

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respondent's case that the appellant had entered into an agreement to sell his shares in Rapid Synergy Bhd ('Rapid'), a company in which the appellant was shareholder and managing director, to the respondent's nominee (the second respondent) for a consideration of RM90.4m ('the share sale agreement'). When the appellant breached the terms of the share sale agreement, the parties

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had negotiated a settlement agreement. Under the settlement agreement, the appellant had agreed to purchase the respondent's property for RM10m ('the purchase price') and to pay from the purchase price a sum of RM3.5m to the Philleo Allied Bank Bhd ('the bank') to settle YYF Properties Sdn Bhd's principal debt with the bank. The respondent thus counterclaimed against the

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appellant and its nominee for them to settle YYF Properties Sdn Bhd's principal debt with the bank, which amounted to the sum of RM3.5m, in accordance with the terms of the settlement agreement. Based on the evidence, the trial judge found that there was no friendly loan. Instead the trial judge was of the view that a contract had been concluded between the appellant and the

respondent for the sale and purchase of the shares in Rapid and that the share sale agreement was thus a valid binding contract between the parties. The High Court thus dismissed the appellant's claim against the respondent and allowed the respondent's counterclaim against the appellant with costs. This was the appellant's appeal against that decision. The appellant submitted that the trial judge had failed to appreciate the evidence adduced by the appellant and to consider adequately the various arguments and submissions made by the appellant.

Held, dismissing the appeal with costs fixed at RM30,000:

(1) The appropriate standard of review for the appellate court to apply in the present case, which involved mixed questions of law and fact, would be to give appropriate deference to the trial judge's factual finding but to independently evaluate the legal effect of those factual findings. The trial judge in the present case had correctly decided that on the balance of probabilities the appellant had failed to prove his claim and that the respondent had proven his counterclaim. The impugned decision did not suffer from any patent legal infirmity or error to warrant appellate interference (see paras 2 & 14).

(2) Having scrutinised the evidence and in the light of the proved facts it was clear, inter alia, that the appellant's claim of a friendly loan was not credible. The written agreement (the agreement) that the appellant relied on to support his claim that the property was the collateral for the alleged friendly loan did not make any reference to the loan. The agreement also did not contain any terms on repayment and/or interest. Further, the appellant's lawyer agreed that the agreement was not a proper instrument for a friendly loan (see para 19).

(3) The trial judge was entirely correct in ruling that the share sale agreement was a valid and binding contract between the parties. Even though the share sale agreement was in the form of a proposal letter, there was a meeting of minds between the respondent's nominee and the appellant in respect of the sale and purchase of the shares in Rapid owned by the appellant for a consideration of RM90.4m. Thus, although the terms and condition were not embodied in a formal contract, a valid and binding agreement had been concluded between the parties (see para 22).

(4) The appellant's argument that the trial judge had failed to appreciate that evidence of the settlement agreement, which was wholly oral in nature and thus inadmissible under ss 91 and 92 of the Evidence Act 1950 was without merit. The parole evidence rule only applied to prove the terms of a contract and not to the existence of the fact of a contract. Thus, oral evidence was inadmissible in the present case to prove the existence of a contract (see paras 25 & 27).

[Bahasa Malaysia summary

Perayu memfailkan satu tindakan terhadap responden untuk pemulangan pinjaman mesra berjumlah RM6.5 juta. Sebagai jaminan untuk pinjaman tersebut responden dikatakan telah bersetuju untuk mencagarkan satu hartanah terletak di Daerah Jesselton, Sabah ('hartanah'). Menurut responden pertama, RM6.5 juta bukan merupakan pinjaman mesra tetapi sebahagian bayaran untuk membeli hartanah tersebut. Kes responden adalah bahawa perayu memeterai satu perjanjian untuk menjual saham-sahamnya di dalam Rapid Synergy Bhd ('Rapid'), sebuah syarikat yang mana perayu merupakan pemegang saham dan pengarah urusan, kepada penama responden (responden kedua) untuk balasan berjumlah RM90.4 juta ('perjanjian jualan saham'). Apabila perayu melanggar terma-terma perjanjian jualan saham, pihak-pihak merundingkan satu perjanjian penyelesaian. Di bawah perjanjian penyelesaian, perayu bersetuju untuk membeli hartanah responden untuk RM10 juta ('harga belian') dan untuk membayar daripada harga belian sejumlah RM3.5 juta kepada Philleo Allied Bank Bhd ('bank') untuk menyelesaikan hutang utama YYF Properties Sdn Bhd dengan bank. Oleh itu responden menuntut balas terhadap perayu dan penamanya agar mereka menyelesaikan hutang utama YYF Properties Sdn Bhd dengan bank yang berjumlah RM3.5 juta, menurut dengan terma-terma perjanjian penyelesaian. Berdasarkan keterangan, hakim perbicaraan mendapati bahawa tidak terdapat pinjaman mesra. Malah, hakim perbicaraan berpendapat bahawa kontrak telah disimpulkan antara perayu dan responden untuk jualan dan belian saham-saham di dalam Rapid dan bahawa perjanjian jualan saham oleh itu merupakan kontrak sah mengikat antara pihak-pihak. Oleh itu Mahkamah Tinggi menolak tuntutan perayu terhadap responden dan membenarkan tuntutan balas responden terhadap perayu dengan kos. Ini merupakan rayuan perayu terhadap keputusan tersebut. Perayu menghujah bahawa hakim perbicaraan gagal untuk menghargai keterangan yang dikemukakan oleh perayu dan untuk menimbangkan secukupnya pelbagai hujahan yang dibuat oleh perayu.

Diputuskan, menolak rayuan dengan kos ditetapkan pada RM30,000:

(1) Standard semakan bersesuaian untuk mahkamah rayuan guna di dalam kes ini, yang melibatkan persoalan dari segi undang-undang dan fakta, adalah dengan memberikan penghormatan sepatutnya kepada dapatan fakta hakim perbicaraan tetapi untuk menilai kesan undang-undang dapatan fakta tersebut secara bebas. Hakim perbicaraan dalam kes ini dengan tepat memutuskan bahawa atas imbangan kebarangkalian perayu telah gagal untuk membuktikan tuntutannya dan bahawa responden telah membuktikan tuntutan balasnya. Keputusan yang dipersoalkan tidak mengalami apa-apa bentuk kelemahan undang-undang atau kesilapan yang membenarkan campur tangan rayuan (lihat perenggan 2 & 14).

(2) Selepas meneliti keterangan dan berdasarkan fakta-fakta yang dibuktikan, adalah jelas, antara lainnya, bahawa tuntutan perayu mengenai satu pinjaman mesra adalah tidak boleh dipercayai. Perjanjian bertulis (perjanjian) yang digunakan perayu bagi menyokong tuntutannya bahawa hartanah tersebut merupakan kolateral untuk pinjaman mesra seperti didakwa tidak merujuk kepada pinjaman tersebut. Perjanjian tersebut juga tidak mengandungi apa-apa terma-terma mengenai bayaran balik dan/atau faedah. Seterusnya, peguamcara perayu bersetuju bahawa perjanjian tersebut bukan merupakan instrumen yang sepatutnya untuk satu pinjaman mesra (lihat perenggan 19).

(3) Hakim perbicaraan betul secara keseluruhannya dengan memutuskan bahawa perjanjian jualan saham adalah sah dan kontrak mengikat antara pihak-pihak. Walaupun perjanjian jualan saham adalah dalam bentuk surat cadangan, terdapat persefahaman antara penama responden dan perayu berhubung jualan dan belian saham-saham di dalam Rapid yang dimiliki oleh perayu untuk pertimbangan RM90.4 juta. Oleh itu, walaupun terma-terma dan syarat tidak dinyatakan dalam kontrak formal, perjanjian sah dan mengikat telah disimpulkan antara pihak-pihak (lihat perenggan 22).

(4) Hujahan perayu bahawa hakim perbicaraan gagal untuk menghargai keterangan perjanjian penyelesaian yang keseluruhannya dibuat secara lisan dan oleh itu tidak boleh digunakan di bawah ss 91 dan 92 Akta Keterangan 1950 adalah tanpa merit. Keterangan parol hanya boleh digunakan untuk membuktikan terma-terma kontrak dan bukan kepada kewujudan fakta sesuatu kontrak. Oleh itu, keterangan lisan tidak boleh diterima dalam kes ini untuk membuktikan kewujudan sesuatu kontrak (lihat perenggan 25 & 27).]

Notes

For a case on parol evidence rule, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 130.

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1217–1245.

For cases on money allegedly loaned, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4782–4783.

Cases referred to

Canada (Director of Investigation and Research, Competition Act) v Southam Inc [1997] 1 SCR 748, SC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)

A *Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah* [2007] 2 MLJ 746, CA (refd)
Housen v Nikolaisen [2002] 2 SCR 235; 2002 SCC 33, SC (refd)
Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650; [2013] 1 LNS 1, CA (refd)
B *Ng Kong Yue & Anor v R* [1962] 1 MLJ 67 (refd)
Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 MLJ 131, CA (refd)
Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor [2008] 5 MLJ 157, CA (refd)
C *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, FC (refd)
United Malayan Banking Corp Bhd v Tan Lian Keng & Ors [1990] 1 MLJ 280, HC (refd)
Zaharah A Kadir v Ramuna Bauxite Pte Ltd & Anor [2011] 1 LNS 1015, HC (refd)
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Legislation referred to
Evidence Act 1950 ss 91, 92

E **Appeal from**: Suit No D7(D1)–22–1095 of 2001 (High Court, Kuala Lumpur)

JJ Chan (Fazleeza bt Azli with him) (Shearn Delamore & Co) for the appellant.
Tan Hock Chuan (Cains Tan and Lee Wenxu with him) (Tan Hock Chuan & Co) for the respondent.

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Zawawi Salleh JCA (delivering judgment of the court):

[1] This appeal is directed against the decision dated 22 January 2010, G rendered at the Shah Alam High Court, dismissing the appellant's claim against the respondent and allowing the respondent's counterclaim against the appellant with costs, after a full blown trial.

[2] We have heard learned counsel appearing for both parties and have H carefully perused the record of appeals available before us. In our view, the impugned decision does not suffer from any patent legal infirmity or error to warrant appellate interference. The appeal is accordingly dismissed with cost fixed at RM30,000 and we make further order for the deposit to be refunded.

I FACTS OF THE CASE

[3] The essential facts of the case can be briefly stated thus: The genesis of the dispute may be traced back to the event which occurred sometime in June or July 1997, when the appellant was introduced by the respondent by a mutual

friend known as Jeffrey Tan (the second respondent in the counterclaim). It was the contention of the appellant that he had given a friendly loan of RM6,500,000 to the respondent on 29 July 1997, at the respondent's request. It was further contention of the appellant that as a security for the friendly loan, the respondent agreed to pledge a property known as Lot No 14716 held under Town Lease No 17127, District of Jesselton, Sabah ('the Kota Kinabalu property').

[4] Therefore, the appellant's claim against the respondent is essentially for the return of the said friendly loan.

[5] As against the appellant's version, the respondent averred that sometime in April 1997, Jeffrey Tan approached the respondent to take over the controlling stake in Rapid Synegy Bhd ('Rapid') from the appellant who was a shareholder and managing director of the Rapid at the material time. Jeffry Tan, as the respondent's nominee, entered into an agreement with the appellant to purchase 8,000,000 Rapid shares owned either directly or indirectly by the appellant for a consideration of RM90,400,000m on 17 June 1997.

[6] The respondent contended that the appellant breached the terms of the Rapid Share Sale Agreement. Negotiations were held between the parties to resolve the breaches committed by the appellant. The appellant agreed to purchase the Kota Kinabalu property belonging to YYF Properties Sdn Bhd at the agreed purchase price of RM10,000,000 as settlement of the aforesaid breaches. YYF Properties Sdn Bhd owned Phileo Allied Bank a principal sum of RM3,500,000. It was agreed that the appellant will pay a sum of RM6,500,000 to the respondent via telegraphic transfer into the respondent's bank account. However, the appellant failed, refused and/or neglected to pay the balance sum of RM3,500,000 to settle YYF Properties Sdn Bhd's principal debt with PhileoAllied Bank.

[7] Therefore, the respondent's counterclaim against the appellant and Jeffery Tan, inter alia, is for them to settle the principle debt of YYF Properties Sdn Bhd of RM3,500,000 together with interest accrued with Phileo Allied Bank Bhd in accordance with the terms of settlement agreement with the respondent.

FINDINGS OF THE TRIAL JUDGE

[8] The learned trial judge, after a detailed discussion of the evidence adduced in the course of trial, held as follows:

(a) that there was no friendly loan as it is hard to believe why a friendly loan

agreement could not and was not prepared, and that the said agreement dated 24 July 1997 (exh P1) is not a proper document for the purpose of a friendly loan;

(b) that the Rapid Share Sale Agreement in the form of a letter dated 17 June 1997 (exh D2) was a valid and binding agreement between the appellant and the respondent for the sale of the Rapid shares, and that the appellant was in breach of the Rapid Share Sale Agreement; and

(c) that there was a settlement agreement between the appellant and the respondent in relation to the breach by the appellant of the Rapid Share Sale Agreement, as a result of which the appellant had agreed to purchase the said property for RM10,000,000 and to pay from the purchase price a sum of RM3,500,000 to Phileo Allied Bank Bhd.

THE APPEAL

[9] Before us, the appellant has advanced several grounds in support of his appeal. However, the main thrust of the argument of learned counsel for the appellant is that the learned trial judge erred in law and in fact in dismissing the appellant's claim for the return of the sum of RM6,500,000 and in allowing the respondent's counterclaim, and in so doing, failed not only to appreciate the evidence adduced by the appellant vis a vis the evidence of the respondent but had failed to consider adequately the various arguments and submissions made on behalf of the appellant.

[10] On the contrary, it was the submission of learned counsel for the respondent that the learned trial judge did not err in law and fact in dismissing the appellant's claim and allowing the respondent's counterclaim. There was evidence upon which Her Ladyship could make the findings that she did.

STANDARD OF REVIEW

[11] At the outset, it is pertinent to note that much of the attack mounted by learned counsel for the appellant revolves around the questions of mixed fact and law. A mixed question of fact and law arises when the trial judge applies a legal standard to a set of facts. This differs from factual findings or inferences which require the trial judge to draw inferences or conclusions from facts.

[12] In *Canada (Director of Investigation and Research, Competition Act) v Southam Inc* [1997] 1 SCR 748, Justice Frank Lacobucci wrote:

> [Q]uestion of law are questions about what the correct legal test is.

> … Questions of fact are question about what actually took place between the parties. And questions of mixed law and fact are questions about whether the facts satisfy legal tests.
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> … A simple example will illustrate these concepts. In the law of tort, the question what negligence means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or vice versa.

(See also *Housen v Nikolaisen* [2002] 2 SCR 235; 2002 SCC 33)

[13] Application of the correct standard review has not been proved exceedingly difficult in cases involving purely factual or purely legal questions. It is trite that the appropriate standard of review for purely legal questions is de novo review where the appellate court is not required to give deference to the rulings of the trial judge. Rather, it is free to perform its own analysis of the legal issue presented. When the finding of the trial judge is factual, however, the fact finder's decision cannot be disturbed on appeal unless the decision of the fact finder is plainly wrong (see *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163); *Zaharah A Kadir v Ramuna Bauxite Pte Ltd & Anor* [2011] 1 LNS 1015, *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; [2013] 1 LNS 1). The findings of fact of the trial judge can only be reversed when it is positively demonstrated to the appellate court that:

(a) by reason of some non-direction or mix-direction or otherwise the judge erred in accepting the evidence which he or she did accept; or

(b) in assessing and evaluating the evidence the judge has taken into account some mater which he or she ought not to have taken into account, or failed to take into account some matter which he or she ought to have taken into account; or

(c) it unmistakenly appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he or she cannot have taken proper advantage of his or her having seen and heard the witnesses' or

(d) in so far aside judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he or she accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.

[14] What, then, is the appropriate standard of review for the appellate court to apply in mixed question of fact and law? In our view, the appropriate standard of review in this situation would be to give appropriate deference to the trial judge's factual finding but to reserve for the appellate court the ability to independently evaluate the legal effect of those factual finding.

[15] With this legal principle in mind, we now turn to consider the specific grounds of appeal raised by learned counsel for the appellant.

(a) Whether RM6,500,000 is a friendly loan or it is part payment for the purchase of the said property as settlement of the breaching committed by the appellant

[16] Learned counsel for the appellant would submit that the sum of RM6,500,000 received by the respondent from the appellant is in respect of a friendly loan and that it makes no difference whether there was no friendly loan agreement or that the said agreement dated 24 July 1997 is not a proper document for the purpose of a friendly loan as held by the learned trial judge.

[17] With respect, we cannot agree with the submission of learned counsel for the appellant. There was ample evidence to support the finding of the learned trial judge. The learned trial judge found that the appellant' submission that the evidence points to no other transaction between the appellant and the respondent except for the friendly loan is fallacious.

[18] In a careful and detailed analysis of the evidence, the learned trial judge had this to say at pp 53–55 of record of appeal:

> Learned counsel for P'ng ('appellant') submitted that the evidence points to the fact that there was no other transaction between P'ng and Yip ('respondent') except the friendly loan of RM6,500,000.00. Therefore as night follows the day, any monies transferred could only have been made pursuant to the friendly loan. So argued learned counsel.
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> PW2 in examination in chief said that 'P'ng told me about the intended sale of Rapid shares. I knew that P'ng and his group wanted to sell their shares in Rapid … P'ng was in the process of negotiating with Jeffrey and Yip for the sale of the Rapid shares P'ng showed me two valuation reports concerning two properties. One in Bentong and one was in K.K. He told me that Yip wanted to inject these two properties into Rapid.' Clearly the above evidence points to the transaction of Rapid shares. Furthermore P'ng admitted in his reply and defence to counterclaim that 'Jeffrey agreed that he would only buy 4 million.' The submission of learned counsel for P'ng that the evidence points to no other transaction between P'ng and Yip except for the friendly loan is, with respect, fallacious.
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> P'ng sought to rely on exhibit P1 as being the collateral given by Yip for the loan. As submitted by learned counsel for Yip, nowhere was it mentioned that exhibit P1 was a collateral for the friendly loan. Exhibit P1 is an agreement for the sale and purchase

of shares in YYF Properties Sdn Bhd between Yip and his wife as the vendor and KL Lee and YK Tan (the nominees of P'ng) as the purchasers. The clauses in P1 are not in accord with it being a collateral for a friendly loan. There are no terms on repayment and/or interest Clause 3(b) of exh P1 provides that the sale and purchase of the shares is subject to the approval of the Foreign Investment Committee and clause 4(b) provides for the payment of Real Property Gains Tax by the vendor.

It was admitted by PW2 that exh P1 is not a proper document for the purpose of a friendly loan. It is hard to believe why a friendly loan agreement could not and was not prepared. PW2 had also admitted that he had not done the necessary searches required for the normal conveyancing transaction. That begs the question, why then did PW 2 not prepare the proper instrument for a friendly loan and not conduct the necessary searches? The probable answer to that question is because there was no friendly loan. PW2 had explained that he did not take the necessary steps as he should because he was short of time. I am not able to accept this explanation especially when P'ng's evidence was that he told PW2 that the loan could be released if PW2 was satisfied that it was secured. How could PW2 be satisfied when he had not taken the necessary steps as he should? PW2's excuse that he was short of time was highly suspect. Rushing for time to prepare the documentation runs counter to the need to have a security for the loan.

The existence of exhibit P1 lends credence to Yip's version that there was an agreement reached between him and P'ng in relation to the breaches by P'ng of the Rapid Agreement. Exhibit P1 being the sale and purchase of YYF shares is consistent with the evidence of Yip that P'ng had agreed to purchase the KK property and that the property be transferred to P'ng by way of selling the shares n YYF Properties. And that is exactly what exhibit P1 is, i.e. an agreement for the sale of purchase of the shares in YYF Properties.

There is another reason why Yip's evidence is more probable. His evidence that the purchase price for the Kota Kinabalu property was RM10,000,000.00 is consistent with the Rapid agreement which states RM10,00,000.00 as the value of the KK property. PW2 also confirmed the said value for the KK property. There being no friendly loan, the reasonable inference to be drawn from the payment of RM6,500,000.00 by P'ng to Yip is that it has to be part payment for the purchase of the KK Property.

[19] Learned counsel for the respondent had carefully taken us through the relevant evidence to demonstrate that the oral evidence adduced through the appellant and his lawyer, PW2, during the trial regarding the alleged friendly loan is not credible (see pp 13–14 of the respondent's written submission). We have scrutinised the evidence and we are in full agreement with learned counsel for the respondent's contention that this aspect of evidence would fly in the face of the following proved facts:

(a) the appellant knew the respondent less than one month before the alleged friendly loan was lent to the respondent. It does not make sense to lend a large sum of money to someone whom you hardly know;

(b) the appellant claimed that the money for the alleged friendly loan

belonged to him and a group of friends but this was never pleaded in the pleadings and/or cause papers as admitted by the appellant;

(c) the appellant alleged that the Kota Kinabalu property was a collateral for the alleged friendly loan and he was cheated that the Kota Kinabalu property was owned by YYF Properties Sdn Bhd which in turn was owned by YYF Corporation Sdn Bhd. YYF Corporation Sdn Bhd was fully owned by the respondent and the respondent's wife, Datin Wong Saw Har. But the appellant knew that YYF means Yip Yee Foo (ie the respondent's name). Hence, it is obvious that the appellant knew that YYF Properties Sdn Bhd and YYF Corporation Sdn Bhd belonged to the respondent and the respondent's wife. As such, his allegation of being cheated is false and without basis as held by the High Court judge;

(d) since the appellant was aware that his lawyer, PW2, did not conduct any searches with the registrar of companies, Insolvency Department and Land Office, why did he instruct his lawyer to release the said sum of RM6,500,000. This is inconsistent with his concern of having a collateral to protect his interest. The only plausible explanation is that the sum of RM6,500,000 was not a friendly loan but a payment for settlement as stated by the respondent;

(e) the appellant alleged that the Kota Kinabalu property was the collateral for the alleged friendly loan and referred to an agreement dated 24 July 1997 ('the said agreement') purportedly to be the Kota Kinabalu property agreement. However, the said agreement did not make any reference to the alleged friendly loan.
From the recitals and clauses of the said agreement, it is clearly a shares sale agreement for the purchase of two shares in YYF Properties Sdn Bhd. Further, there are no terms on repayment and/or interest. This is admitted and/or agreed by the appellant himself and his lawyer, PW2, who was involved in the preparation of the said agreement during the trial; and

(f) the appellant's lawyer, PW2 himself, a coveyancing solicitor since 1992, agreed that the said agreement was not a proper instrument for a friendly loan. He could so easily have prepared a loan agreement if indeed it was a friendly loan. The learned High Court judge rejected PW2's explanation that he was short of time as this runs counter to the need to have the security for the loan.

(b) Whether the Rapid Share Sale Agreement is a valid and binding agreement

[20] Learned counsel for the appellant would argue that there was no valid and binding agreement between the parties in respect of the sale and purchase

of Rapid shares. According to learned counsel, the Rapid Share Agreement is nothing more than the letter of proposal dated 17 June 1997 which had yet to be incorporated into a formal sale and purchase agreement. Though it is not in dispute that the sum of RM13,000,000 had been paid by the respondent for the RM4,000,000 of Rapid shares, there is no question of any refund as the said shares had already been sold by the respondent. Further, there is no obligation on the part of the parties to complete the transaction or any part of the terms therein, and hence, in the event of any breach of the covenants, the transaction will be deemed terminated.

[21] The learned trial judge found that a contract had been concluded for the sale and purchase of the Rapid shares between the appellant and respondent and that the Rapid Share Sale Agreement is thus a valid and binding contract between the parties.

[22] We are of the view that the learned trial judge is entirely correct in ruling that the agreement was a valid and binding contract between the parties. Even though the Rapid Share Sale Agreement was in the form of a proposal letter, it was a valid and binding agreement entered between the parties where the terms and conditions were clear and specific despite the want of a duly executed formal contract as there was an offer by the respondent's nominee, Jeffrey Tan, and acceptance by the appellant in respect of the sale and purchase of the Rapid share owned either directly or indirectly by the appellant for a consideration of RM90,400,000 on 17 June 1997. Pursuant to the Rapid Share Sale Agreement, the respondent paid RM32,000 for 4,000,000 Rapid share sold. This fact is admitted by the appellant himself.

[23] The proposition of law on this issue is very clear. In *Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah* [2007] 2 MLJ 746, the Court of Appeal held that:

> On the facts, there was a concluded contract despite the want of a duly executed formal agreement. There was an offer by the defendant and acceptance by the plaintiff, and there was consideration, certainty of parties, certainty of price and certainty of property. Also, there were the unequivocal acts of part performance by the plaintiff which were referable to an existing contract between the parties. The acts of part performance in the present case were the payment of the deposit coupled with the RM5,000 meant for the squatters. Although it was true that no formal contract of sale and purchase was ever executed, that did not matter since there could be a concluded contract even where the parties contemplated the execution of a more formal document. The defendant's argument that this was a case where the execution of the formal written agreement was a condition precedent to there being a contract was unacceptable. The defendant's own evidence that the defendant would readily accept the balance of the purchase price even without a formal agreement being executed by the parties pointed to the formal agreement being an

A unimportant document to the contracting parties. So, objectively speaking, the parties had already made a contract and the written agreement was a mere formality …

B **[24]** In this instant case, there was a meeting of minds between the respondent's nominee, Jeffrey Tan, and the appellant in respect of the sale and purchase of the Rapid share. There was consideration, certainty of parties, certainty of the price and certainty of property. Although the terms and condition of the agreement are not embodied in a formal contract, a valid and C binding agreement had been concluded between the parties.

(c) Settlement agreement

D **[25]** Learned counsel for the appellant would argue that the learned trial judge had failed to appreciate that the alleged settlement agreement on the part of the appellant to purchase the property for RM10,000,000 was not supported by evidence. According to learned counsel, the evidence adduced is wholly oral in nature and in contradiction with Rapid Share Agreement. Therefore, it is inadmissible under ss 91–92 of the Evidence Act.

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[26] In support of his submission, reliance was placed on the case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131 and *Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 5 F MLJ 157.

[27] With respect, we do not think that the parol evidence rule is applicable here. The parol evidence rule applies only to prove the terms of a contract and G not to the existence of the fact of a contract. Thus, oral evidence is admissible to prove the existence of a contract (see *Ng Kong Yue & Anor v R* [1962] 1 MLJ 67; *United Malayan Banking Corp Bhd v Tan Lian Keng & Ors* [1990] 1 MLJ 280).

H **[28]** The learned trial judge found that the existence of exh P1 (the agreement dated 24 July 1997) lends credence to the respondent's version that there was an agreement reached between him and the appellant in relation to the breaches by the appellant of the Rapid Share Agreement and that exh P1, being the sale and purchase of YYF shares, is consistent with the respondent's I evidence that the appellant had agreed to purchase the said property and that property be transferred to the appellant by way of selling shares in YYF Properties.

[29] The learned High Court judge also found that the appellant's oral

evidence in examination-in-chief confirmed the existence of the Kota Kinabalu property agreement (p 58 of the record of appeal Vol (A)) which he testified that:

> I told CP Tang the rough details of the arrangement with Yip and asked his advise as how to secure the loan. He said the best thing would be to do a sale and purchase agreement for the land in KK … CP Tang prepared the documentation and Lee and Tan signed them after that the documents had been signed by Yip and Yip's wife … I told him that if everything was OK the loan could be released.

(See para 8, p 218 of the record of appeal Vol 2(A)).

CONCLUSION

[30] After considering the arguments urged upon us in support of the submission made on behalf of the appellant, we share the view of the learned trial judge that on the balance of probabilities, the appellant has failed to prove his claim and the respondent has proven his counterclaim.

[31] In our view, none of the points advanced by learned counsel for the appellant would justify any inference with the findings and decision of the learned trial judge.

[32] On the whole, it is sufficient to say that most of the point canvassed before us has been meticulously examined and rejected by the learned trial judge, upon which we cannot improve and to which we do not desire to add.

[33] In the result, the appeal is dismissed with costs. We affirmed the decision of the learned trial judge.

Appeal dismissed with costs fixed at RM30,000.

Reported by Kohila Nesan